No. 75-867

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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the admissibility of a document introduced as a business record, argues that the exercise of federal jurisdiction was inappropriate in this case, and contests the sufficiency of the evidence against him.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and on

seventeen counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent five-year prison terms and fines totaling $27,000. The court of appeals, in a thorough opinion upon which we rely (Pet. App. 1-52), affirmed petitioner's conviction on all but three counts.

1. Petitioner was an Alderman representing Chicago's Thirty-First Ward and was Chairman of the City Council's Committee on Finance. He was charged with having devised a scheme through which, by virtue of his official position, he was able to acquire and resell for a profit significant amounts of real estate. The transactions involved in the scheme were facilitated by mailings, which constituted the basis for the individual mail fraud counts.[2]

The government charged that petitioner had defrauded the city of his services as an alderman, by using inside information to determine in which areas the city would be purchasing land, by introducing and voting on property assessment clearances without disclosing to his fellow aldermen his interests in the lands involved, by voting without disclosure to authorize the city to purchase certain lands in which he had an interest, and by using his influence to induce various city agencies to purchase his lots.

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[1] Three other counts were dismissed by the government at the conclusion of its case-in-chief.

[2] The individual mailings and their relation to the scheme are discussed in detail in the opinion of the court of appeals (Pet. App. 30-35).

The evidence at trial, which is set forth in the opinion of the court of appeals, showed that pursuant to a local statute, Cook County held a "scavenger sale" of tax delinquent properties in June of 1966. Seeking to purchase such properties, petitioner formed a partnership with co-conspirators John Hennessey, Sr., and Nathan Schwartz. The partnership, named Alpine Investments, in turn arranged for the establishment of Chicago Title and Trust land trust No. 53129, into which parcels acquired were to be placed.

Prior to the scavenger sale, petitioner assisted Hennessey in determining which properties should be acquired by the partnership. Among those decided upon were lots in the 87th and Mackinaw area, where petitioner knew that the government would soon build a large project.[3] Alpine secured some 1900 parcels of property from the sale.

In order to obtain clear title to the purchased properties, it was necessary for Alpine Investments to remove special assessment liens against the parcels. This petitioner accomplished in two ways. On those lots for which there were still outstanding bondholders, it was necessary to cause foreclosure proceedings to be instituted. Accordingly, a "Request for Foreclosure of Special Assessment Liens" was filed with the staff of the Subcommittee on Special Assessments, a subcommittee of the Committee on Finance of the City Council.

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[3] Each partner contributed $100,000 to the venture and another $300,000 was obtained from a local bank.

Petitioner was Chairman of the Committee on Finance, and Alderman Fifielski was Chairman of the Subcommittee, a position to which petitioner had appointed him. It was the responsibility of the Subcommittee on Special Assessments to set minimum bids to be made by the applicants for foreclosure of liens, and, in practice, the minimum bid set by the Subcommittee invariably ended up as the purchase price. The Subcommittee usually set the minimum bids at 30 to 60 percent of the amount due on the bonds; the minimum bids on petitioner's properties, however, were set at ten percent of the amount due.

In the case of lots for which the original bonds had been redeemed, title to petitioner's properties was perfected by forwarding "Compromise Offers in Lieu of Foreclosures" to the Subcommittee on Special Assessments. The action of the Subcommittee on both the "Requests for Foreclosure" and the "Compromise Offers" was placed in the report of the Finance Committee—a report which petitioner introduced before the full City Council. These matters were placed in an omnibus bill and voted upon at the end of each day along with other matters.

Petitioner voted favorably upon such bills on numerous occasions, but he never disclosed to the other aldermen his interest in the properties involved. Many of the council members who voted favorably on the bills testified at petitioner's trial that they would have voted against the proposals, or at least

demanded further investigation, had they been aware of petitioner's interest.[4]

Having thus unemcumbered the Alpine properties, petitioner then used his position on the City Council to dispose of the lots, in the following manner:

(a) In May of 1968, petitioner voted in the City Council to authorize the Chicago Housing Authority to acquire properties in certain parts of Chicago in which Alpine properties were located. He did not disclose his interest in the matter voted upon. After the Housing Authority was authorized to make such acquisitions, petitioner called Charles Swibel, its chairman, and urged him to purchase Alpine properties; ultimately the Housing Authority bought 60 of the Alpine lots in those areas.

(b) The Chicago Dwelling Association was a nonprofit corporation, for which the Chicago Housing Authority acted as a purchasing agent. Charles Swibel was also Chairman of the Dwelling Association. When co-conspirator Hennessey initially tried to persuade the Chicago Dwelling Association to purchase certain lots, he was told that they were improperly zoned. In a letter to the individual in charge of land acquisitions for the Chicago Housing Authority (Robert Snow), Dwelling Association attorney Gerald Broderick indicated that Executive Director Ira Bach had told him (Broderick) that Swibel wanted the five Alpine lots purchased "as swiftly as possible."

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[4] Because the land was held in the name of trusts, petitioner's interest in the parcels was not apparent.

Snow declined to make the purchase, but soon thereafter, the Chicago Dwelling Association purchased the lots. The letter to Snow was written the same summer that petitioner had asked Swibel to purchase some of Alpine's lots.

(c) In late 1969, the Metropolitan Sanitary District threatened condemnation on certain Alpine lots, offering to purchase them for $150 per lot. Thereafter, there was a meeting among petitioner, Robert Wiss, an attorney for the Metropolitan Sanitary District, and Harry Rubenstein, an attorney for Alpine. Subsequently, the Metropolitan Sanitary District purchased the land in question for $775 per lot.

(d) In January of 1967, petitioner voted on the City Council to designate the 87th and Mackinaw area, in which he had purchased lots, as a "slum and blighted" area, thereby authorizing the Chicago Department of Urban Renewal to acquire properties there. Petitioner never disclosed his interest in the area, and the Department of Urban Renewal eventually bought three lots of Alpine.[5]

2. Petitioner challenges the admission, as a business record under 28 U.S.C. 1732(a), of a letter-memorandum written by Gerald Broderick, an attorney for the Chicago Dwelling Association (Pet. 16-23). He contends that because the letter contained hearsay statements, it violated his Sixth Amendment right of confrontation.

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[5] The Alpine partnership sold other lots to private interests, also at a profit (Pet. App. 13).

The memorandum was introduced by the government as part of its proof that petitioner had successfully used his position to induce Swibel, as chairman of the Chicago Housing Authority and the Chicago Dwelling Association, to cause those agencies to purchase some of the Alpine properties. The relevant portion of the letter, which was directed to Robert Snow, land acquisition director for the Housing Authority, read: "Mr. Bach [Executive Director of the Chicago Dwelling Association] informed me [Broderick] that Mr. Swibel told him to purchase these lots as swiftly as possible" (Gov't. Exh. 14-2A).

At trial, petitioner stipulated that he had "no question as to the authenticity of the documents" and recognized that "they are business records and kept in the regular course of business * * *" (Tr. 1444-1445; see also Tr. 1363). It was also established that it was the regular course of the business of the agencies involved to keep memoranda of purchasing plans and that, as the court of appeals noted (Pet. App. 45), "Broderick's letter was contemporaneous with Bach's report to him and there appears to have been no motive to misrepresent on the part of either Bach or Broderick."[6] In these circumstances, the foundation necessary for admission un-

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[6] The foundation necessary for admission under the business records exception of 28 U.S.C. 1732(a) has three requirements: that the record was made in the regular course of business, that it is the regular course of the business involved to make such records, and that the record was made contemporaneously with the event or shortly thereafter.

der the business records exception to the hearsay rule was established, and the Broderick letter was therefore properly admitted in evidence under 28 U.S.C. 1732(a).[7]

In any event, the admission of the single Broderick letter, even if error, was harmless in view of the overwhelming evidence of petitioner's guilt introduced during the month-long trial. Petitioner's scheme to defraud involved the use of inside information, voting on matters of personal interest without disclosing that interest, and the use of undue influence. The Broderick letter went only to the undue influence part of this scheme and was cumulative even as to that, for other evidence showed that petitioner had personally called Swibel and secured the purchase of some 60 lots by the Chicago Housing Authority.

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[7] The cases cited by petitioner purporting to limit the use of the business records exception are inapplicable here. In *Phillips* v. *Neil*, 452 F.2d 337, 347-348 (C.A. 6), a medical record was inadmissible because no reason was shown why the author was unavailable at trial, the identity and qualifications of the author were not disclosed, and the record contained a variety of conclusory statements about the defendant's insanity, an issue ultimately for the jury. In *United States* v. *Beasley*, 513 F.2d 309, 314 (C.A. 5), the documents were found not to be business records under 28 U.S.C. 1732 and to exhibit no guaranty of truth. Finally, in *United States* v. *Burruss*, 418 F.2d 677, 678 (C.A. 4), some of the entries in the record were not reported by individuals in the regular course of their business (citizen's reports of thefts to the police).

3. Petitioner claims (Pet. 24-28) that federal jurisdiction was improperly invoked in this case because his activities were local in nature and because the mail fraud statute was not intended to allow "federal oversight or intervention" in such matters.

Petitioner misconceives the nature and purpose of 18 U.S.C. 1341. That section is properly invoked not because of a federal interest in the underlying scheme, but because of the interest of the United States to preserve the integrity of the mails and "to prevent the post office from being used to carry schemes to defraud into effect" (Pet. App. 15). See *Parr* v. *United States*, 363 U.S. 370, 389; *United States* v. *Edwards*, 458 F.2d 875, 880 (C.A. 5); *United States* v. *Cashin*, 281 F.2d 669, 674 (C.A. 2). The mails were used to further the fraud of depriving Chicago, its council, and its citizens of petitioner's unbiased and disinterested services and judgment. The scheme therefore fell within the prohibition of Section 1341. See Pet. App. 25-29; *United States* v. *Barrett*, 505 F.2d 1091 (C.A. 7), certiorari denied, 421 U.S. 964; *United States* v. *Isaacs*, 493 F.2d 1124 (C.A. 7), certiorari denied, 417 U.S. 976; *United States* v. *States*, 488 F.2d 761 (C.A. 8), certiorari denied, 417 U.S. 909.

4. Petitioner finally urges (Pet. 23-24) that the government's evidence was "so insubstantial as to violate the standard required on review of criminal cases." However, the court of appeals, applying the proper standard, reviewed the evidence and concluded (Pet. App. 18):

With respect to the acquisition of a significant number of parcels in the 87th and Mackinaw area, the evidence in its form most favorable to the government showed that while discussing what properties to acquire at the scavenger sale, Keane told Hennessey to buy in this area because a "big government project" was going up. Subsequently, 30 parcels in this area were purchased.

Although the defense introduced evidence to show that discussions concerning urban renewal in this area had been going on for a decade, the government introduced evidence that it was not until August 21, 1966 (after the scavenger sale), that an announcement was made to the public that the area had definitely been designated to undergo study to see if it qualified for urban renewal. Thereafter, the area was designated by the City Council, with Keane voting in the affirmative as "slum and blighted" and the D.U.R. began acquiring land in the area including three lots in which the defendant had an interest.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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